IN THE

Supreme Court of the United States.

OCTOBER TERM. 1899.

No. 603.

WILLIAM S. TAYLOR AND JOHN MARSHALL,
PLAINTIFFS IN ERROR,

vs.

J. C. W. BECKHAM.

ERROR TO THE COURT OF APPEALS OF KENTUCKY.

Brief for the Defendant in Error.

Taylor claims that he has been deprived of the office of governor of Kentucky without due process of law, and upon that ground invokes the jurisdiction of this court; but the highest court of the State held that he never acquired title to the office, by the only method in which title thereto can be acquired under the constitution and laws of the State, and on that ground decided the case against him. That decision involves no Federal question, and since

it is sufficient to dispose of the case and warrants the judgment rendered by the court of appeals, we submit that this court is without jurisdiction.

Before Taylor can claim that he was "deprived" of the office of governor he must show that he had a pre-existing title to the office; but whether he had or not is purely a question arising under the constitution and laws of the State, which has a right to provide how the result of an election for the office shall be ascertained and declared and title thereto established. The Federal Constitution prescribes no regulation on the subject. This fundamental doctrine is not open to dispute. It is recognized in Boyd *vs.* Thayer, 143 U. S., 135, 161, where Mr. Chief Justice Fuller said:

"Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial courts or otherwise."

And in Wilson *vs.* State of North Carolina, 169 U. S., 586, 594, where Mr. Justice Peckham said:

"In its internal administration the State (so far as regards the Federal Government) has entire freedom of choice as to the creation of an office for purely State purposes, and of the terms upon which it shall be held by the person filling the office."

For more than a hundred years the constitution of Kentucky has provided that the result of elections for governor and lieutenant governor shall be ascertained and finally settled and declared by the legislature. The provision of the present constitution, adopted in 1891, taken verbatim from the constitution of 1850 (art. 3, sec. 24), is as follows:

"SEC. 90. Contested elections for governor and lieutenant governor shall be determined by both houses of the General Assembly, according to such regulations as may be established by law."

The constitution of 1799 contained the following provision :

"Contested elections for a governor and lieutenant governor shall be determined by a committee, to be selected from both houses of the General Assembly, and formed and regulated in such manner as shall be directed by law." Art. III, sec. 27.

The highest court of the State has uniformly held and in the present case has again declared that under these constitutional provisions there is no power except in the legislature to ascertain and declare the result of an election, and that its decision is not subject to judicial review. That decision involves no federal question. It is only a declaration of the well-settled rule that where a specific mode of contesting elections is provided by the constitution or laws of a State, that mode is exclusive, and that where the power is lodged in the legislature its decision is final and not subject to judicial revision or annulment on any ground whatever.

State *vs.* Marlow, 15 Ohio St., 114, 134.
State *vs.* Harmon, 31 Ohio St., 250.
State *vs.* Berry, 47 Ohio St., 232.
Stearns *vs.* Wyoming, 53 Ohio St., 352.
State *vs.* Baxter, 28 Ark., 129.
Corbitt *vs.* McDaniel, 77 Ga., 544.
People *vs.* Goodwin, 22 Mich., 496, 501.
Hipp *vs.* Charlevoix County Supervisors, 62 Mich., 456.
Commonwealth *vs.* Leech, 44 Pa. St., 332.
State *vs.* Mason, 77 Mo., 189.
State *vs.* Francis, 88 Mo., 557.
Garrard *vs.* Gallagher, 11 Nev., 382.
Dennett, petitioner, 32 Me., 508.
Selleck *vs.* Common Council of South Norwalk, 40 Conn., 359.
Wright *vs.* Fawcett, 42 Tex., 203.
Rogers *vs.* Johns, 42 Tex., 339.
Bonner *vs.* Lynch, 25 La. Ann., 267.

The law of Kentucky was settled in 1858 by the case of Batman *vs.* Megowan, 1 Metc. (Ky.), 508, which was followed in 1894 in Stine *vs.* Berry, 96 Ky., 63. Extracts from the opinions in these two cases are found in the record at pages 53, 54. They show how firmly settled the rule has always been in Kentucky that the decision of the contest board is conclusive and not subject to judicial review.

Beckham presented a clear and indisputable title to the office, evidenced by the finding and declaration of the legislature that he had been duly elected. Taylor relied upon a certificate of the State board of canvassers, but that was superseded by the subsequent action of the legislature declaring Beckham's election. On this subject the court of appeals says (Rec., p. 150):

"But the certificate of the State board of canvassers is no evidence as to who was in truth elected. Their certificate entitles the recipient to exercise the office until the regular constitutional authority shall determine who is the *de jure* officer. The rights of the *de jure* officer attached when he was elected, although the result was unknown until it was declared by the proper constitutional authority. When it was so declared it was simply the ascertainment of a fact hitherto in doubt, or unsettled. The rights of the *de facto* officer, under his certificate from the canvassing board, were provisional or temporary until the determination of the result of the election as provided in the constitution, and upon that determination, if adverse to him, they ceased altogether. Such a determination of the result of the election, by the proper tribunal, did not take from him any pre-existing right; for if not in fact elected, he had only a right to act until the result of the election could be determined."

This is in accordance with the decision of the supreme court of Ohio, in State *vs.* Harmon, 31 Ohio St., 250, 260, where they said:

"Our system of elections is unknown to the common law. The whole subject is regulated by statute; and the mode of contesting elections is part of the machinery provided by statute for ascertaining the result of the election."

At the request of Taylor the trial court stated its conclusions of fact separately. It was found as a fact that—

"Said contests were finally determined by the General Assembly on the second day of February, 1900, at which time it was adjudged and determined by each house of said General Assembly, acting separately and also in joint session, that the said William Goebel was duly elected governor of the Commonwealth of Kentucky for the term beginning December 13, 1899, and was entitled to said office of governor, and it was then and there in like manner determined by said General Assembly and by each house acting separately and in joint session that the said J. C. W. Beckham was duly elected lieutenant governor of said Commonwealth for the same term."

This finding of fact is not open to review in this court.

Taylor's whole complaint is that the State court refused to permit him to introduce parol testimony to show that the action of the legislature, in the exercise of its undoubted constitutional authority to declare the result of the election, was tainted with fraud; but if the State court erred in holding that the action of the legislature could not be impeached in this way the error presents no Federal question. The Constitution of the United States does not guarantee that the parties to a suit in a State court in which an act of the legislature of the State is in issue shall have the right to impeach it for fraud by parol testimony.

In Central Land Co. *vs.* Laidley, 159 U. S., 103, 112, Mr. Justice Gray said:

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State court does not deprive the unsuccessful party of his property without due process of law, within the fourteenth amendment of the Constitution of the United States (Walker *vs.* Sauvinet, 92 U. S., 90; Head *vs.* Amoskeag Mfg. Co., 113 U. S., 9, 26; Morley *vs.* Lake Shore & M. S. R. Co., 146 U. S., 162, 171; Bergeman *vs.* Backer, 157 U. S., 655)."

In Allen *vs.* State of Georgia, 166 U. S., 138, where it was held that the dismissal by a State court of a writ of error taken from a sentence of death, because the plaintiff in error had escaped and was a fugitive from justice, was not a denial of due process of law, Mr. Justice Brown said, page 140:

"We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In Chicago, Burlington and Quincy Railroad Co., 166 U. S., 226, 246, Mr. Justice Harlan said:

"Many matters may occur in the progress of such cases that do not necessarily involve in any substantial sense the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the State court may constitute only error in the administration of the law under which the proceedings were instituted."

Substantially the same language is used in Backus *vs.* Fort Street Union Depot Co., 169 U. S., 557, 565.

In Kennard *vs.* Louisiana, 92 U. S., 480, 481, Mr. Chief Justice Waite said:

"The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all."

But the decision of the court of appeals in refusing to receive parol testimony to impeach the action of the legislature for irregularity or fraud is not subject to criticism. It is only in accord with the general rule which has been repeatedly affirmed by this court.

United States *vs.* Des Moines Navigation and Railway Co., 142 U. S., 510, involved the validity of a resolution passed by the legislature of the State of Iowa. The bill averred that its passage was induced by false representations and threats of suit, and it was claimed that the defendant had admitted the fact by demurring to the bill; but Mr. Justice Brewer, speaking for the court, said (p. 544):

"Such an allegation amounts to nothing. The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith."

The learned justice quoted with approval the words of Judge Cooley (Constitutional Limitations (5th ed.), 222; 6th ed., 220), in which the author says that in any case in which the legislature has kept within the constitutional limits and observed the constitutional conditions—

"The courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. If evidence was required it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding. And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon."

To the same effect is United States *vs.* Old Settlers, 148 U. S., 427, 466, and cases cited.

Since the case was decided by the State court upon the sole ground that Taylor did not show title to the office, it is unnecessary in our view to inquire whether a political

office is property within the meaning of the fourteenth amendment. That question can only arise in a case in which a pre-existing title (admitted or established) is divested by some act of the State. We submit, however, that a political office created by a State is not property within the meaning of the amendment. That it is not property at all was held by Judge Taft in the case of Sweeney *vs.* Poyntz (circuit court for the district of Kentucky, February 12, 1900, not yet reported), brought to enjoin the State board of canvassers from hearing or deciding the contest over the office of the auditor of public accounts of Kentucky on the ground of fraud, in which the court refused an injunction and dismissed the bill. Judge Taft said:

"It is sought to distinguish the case at bar from the Sawyer case (124 U. S., 200) on the ground that the decision there rested on the proposition that the office in question was not property, and equity only furnished injunctive relief to protect property rights; while here it is said that the office from which it is threatened to oust complainant is property. The office of auditor of public accounts and its duration is provided for by the constitution of Kentucky, and the same instrument forbids the legislature from increasing or diminishing the salary thereof during the term of any incumbent. It is urged that this freedom from legislative abolition and control makes the office property. The constitution of Kentucky does not declare that office is property, and the mere fact that the legislature cannot abolish it or change its salary does not change its character. The people by a new constitution might certainly abolish the office.

"The restriction only limits the power of the legislature to deal with the office, but it does not make it property. In England at common law it was otherwise. An office was an incorporeal hereditament, and might be granted either for life or in fee. In this country public offices are mere agencies or trusts. The compensation allowed by law is deemed equivalent for the service rendered. The prospective salary or other emoluments of a public office are not the property of the officers or of the State. They are not property at all. They are like daily wages unearned and which

may never be earned. The incumbent may die or resign and his place be filled and his wages earned by another. The right to compensation grows out of the rendition of the services and not out of any contract between the State government and the officer that the services shall be rendered by him. This is the view of all the American authorities except those of the State of North Carolina. No case has been cited to me from Kentucky, but in the other States the authorities are abundant (State *vs.* Hawkins, 44 Ohio St., 98, 109; Conner *vs.* Mayor, 5 N. Y., 285; State *vs.* Dews, R. M. Charlton (Georgia), 397; *Ex parte* Lambert, 52 Ala., 79; Prince *vs.* Skillin, 71 Maine, 361; State *vs.* Davis, 44 Missouri, 129; State *vs.* Douglas, 26 Wis., 428). It is true that in many of these cases there was no constitutional restriction upon the legislative power to change the salary, but the *ratio decidendi* of each decision was found not in the legislative power, but the nature of the relation of a public officer to the public. It was held to be a trust or agency and not property at all. If the acceptance of an office created a contract right, the legislature could not have impaired it, but the reason why the legislative power could change the salary, in the absence of constitutional restriction, is because election or appointment to an office and acceptance are not a contract. Whether the legislature may change is only a matter of the delegation of legislative power to deal with officers authorized by the constitution; it does not change the nature of the office, which, no matter in whom rests the power of change, is neither property nor a contract right."

The suit at bar was brought under section 480 of the Civil Code of Kentucky, which provides:

"In lieu of the writs of *scire facias* and *quo warranto*, or of an information in the nature of *quo warranto*, ordinary actions may be brought to vacate or repeal charters and to prevent the usurpation of an office or franchise."

Sections 481 and 482 provide that if the action is to repeal a charter it must be in the name of the Commonwealth, and that in certain cases it shall be instituted only by order of the legislature. Section 483 provides that "if a person usurp an office or franchise, the person entitled thereto, or

the Commonwealth, may prevent the usurpation by an ordinary action."

The decision brought here for review is simply to the effect that in such an action the title of the claimant, as finally established by the legislature or other board of contest, must prevail. That decision, we respectfully submit, presents no Federal question, and the writ should be dimissed for want of jurisdiction.

LAWRENCE MAXWELL, JR.,
Counsel for the Defendant in Error.

W. S. PRYOR,
LEWIS MCQUOWN,
Of Counsel.

No. 603 & 604.

Brief of McQuown for Defendants in Error.

Office Supreme Court U.S.
FILED
APR 30 1900
JAMES H. McKENNEY,
CLERK.

Filed April 30, 1900.

Supreme Court of the United States.

WILLIAM S. TAYLOR AND JOHN MARSHALL,
Plaintiffs in Error,

VERSUS (No. 603.)

J. C. W. BECKHAM,
Defendant in Error.

AND

WILLIAM S. TAYLOR AND JOHN MARSHALL,
Plaintiffs in Error,

VERSUS No. 604.

J. C. W. BECKHAM, ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

LEWIS McQUOWN,
Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES

WILLIAM S. TAYLOR AND JOHN MARSHALL,
Plaintiffs In Error,

VERSUS (No. 603.)

J. C. W. BECKHAM,
Defendant In Error.

AND

WILLIAM S. TAYLOR AND JOHN MARSHALL,
Plaintiffs In Error.

VERSUS (No. 604.)

J. C. W. BECKHAM, ET AL.,
Defendants In Error.

BRIEF FOR DEFENDANTS IN ERROR.

I. STATEMENT OF THE CASE.

The first-named case (No. 603) was an action at law, in the nature of a quo warranto, as provided by the Kentucky Code of Practice (section 480), brought by J. C. W Beckham, defendant in error, against William S. Taylor and John Marshall, plaintiffs in error, for usurpation of the offices of Governor and Lieutenant-Governor; and the second-named suits (No. 604) were brought by William S. Taylor and John Marshall, plaintiffs in error, against the said J. C. W. Beckham, for alleged usurpation of the said offices. All the cases, therefore, present the same questions of law and fact.

It is averred in the petition in the first-named action that at the election held on the 7th day of November, 1899, in the

Commonwealth of Kentucky, that William Goebel was the Democratic candidate for the office of Governor, and that J. C. W. Beckham was the Democratic candidate for the office of Lieutenant-Governor, and that at said election the plaintiffs in error, William S. Taylor and John Marshall, were the Republican candidates for the said offices of Governor and Lieutenant-Governor, respectively; that after said election the State Board of Election Commissioners, whose duty it was to canvass the returns from said election, met and determined, from the face of said returns, that the said Taylor and Marshall were elected Governor and Lieutenant-Governor, respectively, for the term commencing December 12, 1899, and accordingly awarded to them certificates showing said facts, and they were thereupon, inducted into the said offices.

It is further averred in the said petition that within the due time allowed by law the said William Goebel and J. C. W. Beckham gave written notices to the said Taylor and Marshall that they would each contest the said election upon numerous grounds, set out, at large, in the respective notices; that said notices of contest, duly executed upon said Taylor and Marshall, were filed before each House of the General Assembly, and entered, at large, upon the journals thereof; that thereafter Boards of Contests were duly selected by each House of the General Assembly, and sworn to try said contests as required by law; that at the time appointed for the hearing the said Taylor and Marshall appeared, and each filed defense and counter notices, and the evidence of contestants and contestees was heard by the boards from January 15, 1900, until January 29, 1900, inclusive, and upon January 30, 1900, the said contests were submitted without argument to said boards for decision; that thereafter, the said boards having considered the matters of law and fact involved in the said contests, did each separately decide the contest submitted to it, and made out, in writing, its said decision, and reported the same to each House of the General Assembly for its action thereon; that in the contest for Governor the Board determined, and so reported to each House of the General Assembly, that William Goebel had received the highest number of legal votes cast for Governor,

at the election held on November 7, 1899, and that he was duly elected Governor for the term beginning December 12, 1899, and that the contestant, Beckham, had received the highest number of legal votes cast at the said election, and was duly elected to the office of Lieutenant-Governor for the said term.

It is also further alleged that the said decisions and reports of the Contest Boards were thereafter duly adopted and approved by both Houses of the General Assembly, in separate and joint sessions; that there were present in the House of Representatives, at the said time, fifty-six members, and in the Senate, nineteen members, which was a quorum of each House, and that there were present seventy-five members in the joint session; that the General Assembly did then and there determine, adjudge and declare that said William Goebel and J. C. W. Beckham had each received the highest number of legal votes cast at said election, and were duly elected Governor and Lieutenant-Governor as aforesaid. Copies of the journals of both Houses of the General Assembly, showing all the proceedings and facts aforesaid, were filed as part of the petition.

It is further alleged that after the determination of the said contests, by the General Assembly, that the said William Goebel and J. C. W. Beckham were sworn and duly inducted into the offices of Governor and Lieutenant-Governor of the Commonwealth, and at once entered upon the discharge of their respective duties; that thereafter, upon the 3d day of February, 1900, William Goebel died and, by law, the said Beckham was required to discharge the duties of the said office of Governor, and, accordingly, upon the said day, he took the oath prescribed by law and immediately entered upon the discharge of the duties of the said office.

The further averment was made in the said petition that the powers of the said William S. Taylor, as Governor, and of John Marshall, as Lieutenant-Governor, immediately ceased upon the determination of the said contests by the General Assembly, but that notwithstanding the premises, the said Taylor and Marshall had usurped the said offices of Governor and Lieutenant-Governor, and had refused, upon demand, to

surrender the records, archives, and journals, and the possession of the executive offices, in the Capitol, in the city of Frankfort.

The prayer of the petition is that the said Taylor and Marshall be adjudged to have ursurped the offices of Governor and Lieutenant-Governor, and that the said J. C. W. Beckham be adjudged entitled to the said office, and that he be placed in the possession of the executive offices in the Capitol, with their records, archives and journals. (Pp. 1-9, Vol. 1 Tr.)

The answer and counterclaim filed by the plaintiffs in error seeks to avoid the material allegations of the petition by alleging, in substance, that the action of the boards and of the General Assembly, in the contests, was the result of a conspiracy, entered into by the members of the boards, and of the General Assembly to wrongfully and unlawfully deprive the contestees of their said offices. It is alleged that in the execution of this design the members of the said boards were fraudulently selected, and not fairly drawn, by lot, as required by law, and that a majority of the boards were partisan friends of the contestants, and a number of them had previously advised that the contests be made.

It is further alleged that when the General Assembly attempted to determine said contests at Frankfort that it had no power to do so, because there was not a quorum present, and for the further reason that William S. Taylor, as Governor, on the 31st day of January, 1900, had adjourned the General Assembly from Frankfort to meet on the 6th day of February, 1900, at London, in Laurel county.

The prayer is that the petition be dismissed; that J. C. W. Beckham be adjudged a usurper of the offices of Governor and Lieutenant-Governor, and that William S. Taylor and John Marshall be adjudged the Governor and Lieutenant-Governor, respectively, of the Commonwealth. (Pp. 10-47, Vol. 1 Tr.)

By an amended answer the plaintiffs in error relied upon the alleged facts that the provisions of the Constitution of Kentucky, and the laws passed in pursuance thereof, giving to the General Assembly the power to determine the contests for Governor and Lieutenant-Governor, vested in the legislative

department judicial power, which was arbitrarily used in the determination of the said contests, and that the exercise of this power, if given effect, will deprive the people of Kentucky of their political liberty, and the plaintiffs in error of the right to hold the offices of Governor and Lieutenant-Governor, without due process of law, which, it is alleged, is in violation of the fourteenth amendment to the Constitution of the United States. (Pp. 58-61, Vol. 1 Tr.)

A demurrer was filed and sustained to the answer, and the defense was adjudged insufficient in the court below, and upon appeal to the Court of Appeals of Kentucky this judgment was affirmed. The cases are in this court on writ of error to the Court of Appeals of Kentucky. The defendants in error have entered a motion to dismiss the writ, because no Federal question is presented, and this court is without jurisdiction. The hearing is upon this motion and the merits.

II. DUE PROCESS OF LAW.

Do the provisions of the Constitution of Kentucky, and the laws made in pursuance thereof, regulating the trial of contested elections for Governor and Lieutenant-Governor, afford due process of law, within the meaning of the fourteenth amendment to the Constitution of the United States? This is the controlling question for determination here.

The power to hear and determine these contests is granted to the General Assembly by section 90 of the present Constitution of the Commonwealth, in the following words:

> "Contested elections for Governor and Lieutenant-Governor shall be determined by both Houses of the General Assembly, according to such regulations as may be established by law."

This section is identical with section 24, article 3 of the third Constitution, adopted in 1850. The corresponding provision in the second Constitution, adopted in 1799, is as follows:

> "Contested elections for Governor and Lieutenant-Gov-

ernor shall be *determined by a committee*, to be selected from both Houses of the General Assembly, and formed and regulated, in such manner, as shall be directed by law." (Sec. 27, Ar. 3)

Section 18, article 1 of the first Constituton, adopted in 1792, contains the same provision.

The first and second Constitutions of the Commonwealth, it will be seen, vested the power to determine the contests in a "committee;" while the third and fourth Constitutions vested the power—

> "In both Houses of the General Assembly, according to such regulations as may be established by law."

The General Assembly, for the purpose of carrying into effect the provisions of the Constitution, enacted a law, which is codified as follows in the Kentucky Statutes:

> "Section 1535. No application to contest the election of an officer shall be heard, unless *notice thereof*, in writing, signed by the party contesting, is given.
>
> "1st. The notice shall state the *grounds of the contest*, and none other shall be heard as coming from such party; but the contestee may make defense without giving counter notice.
>
> "2d. In the case of an officer, elective by the voters of the whole State, or any judicial district, the notice must be given *within thirty days* after the final action of the Board of Canvassers.
>
> "Section 1596a. When the election of a Governor or Lieutenant-Governor is contested, a board for determining the contest shall be formed in the following manner:
>
> "1st. On the third day after the organization of the General Assembly which meets next after the election, the Senate shall select, by lot, three of its members, and the House of Representatives shall select, by lot, eight of its members, and the eleven so selected shall constitute a board, seven of whom shall have power to act.
>
> "3d. The members of the board, so chosen by the two Houses, shall be sworn by the Speaker of the House of

Representatives to try the contested election and give true judgment thereon, according to the evidence, unless dissolved before rendering judgment.

"4th. The board shall, within twenty-four hours after its election, meet, appoint its chairman, and assign for hearing the contest, and adjourn from day to day, as its business may require.

"5th. If any person so selected shall swear that he can not, without great personal inconvenience, serve on the board, or that he feels an undue bias for or against either of the parties, he may be excused by the House from which he was chosen from serving on the board; and if it appears that a person so selected is related to either party, or is liable to any other proper objection on the score of his partiality, he shall be so excused.

"6th. Any deficiency in the proper number so created shall be supplied by another draw from the box.

"7th. The board shall have power to send for persons, papers and records, to issue attachments therefor, signed by its chairman, swear witnesses by its chairman or clerk, and issue commissions for taking proof.

"8th. Where it shall appear that the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot, under the direction of the board. Where the person returned is found not to have been legally qualified to receive the office at the time of his election, a new election, as provided herein, shall be ordered to fill the vacancy, provided the first two years of his term shall not have expired. Where another than the person returned shall be found to have received the highest number of legal votes given, such other shall be adjudged to be the person elected and entitled to the office.

"9th. No decision shall be made but by the vote of six members. The decision of the board shall not be final nor conclusive. Such decision shall be reported to the two Houses of the General Assembly, for the future action of the General Assembly. And the General Assembly shall then determine such contest." (Subsec. 9 of Sec. 8, Act March 11, 1898.)

"10th. If a new election is required, it shall be imme-

diately ordered by proclamation of the Speaker of the House of Representatives, to take place within six weeks thereafter, and on a day not sooner than thirty days thereafter.

"11th. When a new election is ordered, or the incumbent adjudged not to be entitled, *his powers shall immediately cease*, and if the office is not adjudged to another it shall be deemed to be vacant."

Section 1, article 7, Revised Statutes of Kentucky (adopted in 1852), and sections 6 and 7 of the act of December 21, 1799 (1 M. & B., pp 593-4), provide in substance the same procedure for the organization of the boards and the trial of contested elections for Governor and Lieutenant-Governor as now provided by the above statute.

Do these provisions of the Constitution and statutes afford due process of law, within the meaning of the fourteenth amendment to the Constitution?

In a case concerning a contest for office the court, in discussing this question, said:

> "A State statute regulating proceedings for the removal of a person from a State office was not repugnant to the Constitution of the United States, if it provided for bringing the party against whom the proceeding was had into court and notifying him of the case he had to meet, for giving him an opportunity to be heard, in his defense, and for the deliberation and judgment of the court." (Foster v. Kansas, 112 U. S., 206.)

It will be perceived that by the provisions of the Kentucky Statute notice of the contest, specifying the grounds, must be given within thirty-days after the action of the Canvassing Board; the members of the board must be selected by lot and sworn to try the contest, and "give true judgment thereon, according to the evidence;" the board is required to assign "a day for hearing the contest," and may adjourn from day to day; it has power to compel the attendance of witnesses and to swear them; it may compel the production of papers and records; six members of the board may render a decision, which

must be reported to both Houses of the General Assembly, which shall finally determine the contest.

Thus it will be seen that a hearing, after reasonable notice, is provided; and this is all that due process of law means. It is not necessary that the process should issue from a court, or that the hearing should be by a judicial officer. Neither is it necessary that there should be a trial by jury.

> "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over the law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States made in pursuance thereof." (Walker v. Saurinet, 92 U. S., 90.)
>
> "It is clear that the fourteenth amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords a fair opportunity to be heard, before the issues are decided." (Iowa Central Railway Co. v. Iowa, 160 U. S., 392.)

The law of very many States on this subject is the same as the Kentucky Constitution and statute. There is a constitutional provision in Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Mississippi, Missouri, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Virginia and West Virginia which either vests the power to determine contested elections for Governor and Lieutenant-Governor in a committee selected from the General Assembly, or in the two Houses themselves, with procedure like that provided in the Kentucky statute.

Thus, for example, the Constitution of Pennsylvania, adopted in 1874, contains the following provision:

> "Contested elections shall be determined by a committee, to be selected from both Houses of the General Assembly, and formed and regulated in such manner as shall be directed by law." (Sec. 2, Ar. 4.)

By the Pennsylvania statute the committee is selected by lot, hears the case and determines it, just as the Board of Contest does under the Kentucky Statute. The only point of difference is that in Pennsylvania the report of the committee is final and conclusive, while in Kentucky the General Assembly determines the contest, after the report is made to both Houses. (Secs. 209, 212 and 225, Chap. on "Elections," Brightley's Purdon's Digest, Laws of Pennsylvania.)

Section 5, article 4 of the Constitution of Iowa, which was adopted in 1857, is identical with section 90 of the present Constitution of Kentucky, and the statute of Iowa, enacted to regulate the procedure in contested elections, is, in substance, the same as the Pennsylvania and Kentucky statutes. The judgment of the committee there is conclusive. (Secs. 1242, 1243 and 1245, Iowa Stat.)

If the objection to the provisions of the Kentucky Constitution and statutes is sustained, in this case, it will be seen that the corresponding provisions in the organic laws of all the States referred to are likewise invalid. It is certainly remarkable that such wide-spread error should exist in reference to what is due process of law, and what is the exercise of merely arbitrary power, within the meaning of the fourteenth amendment to the Constitution.

But it is complained that by the administration of the statute the Board of Contest deprived the plaintiffs, in error, of their offices without due process of law; that they were not allowed to introduce all their proof, and that counsel for them were not permitted to argue the case before the board, and that the evidence did not authorize the judgment of the board or of the General Assembly.

More than one hundred and fifty witnesses testified in the case. More than one hundred of these testified for the plaintiffs in error. The hearing commenced January 15 and continued till near midnight of January 29, 1900. The argument was to begin at 2 o'clock on the afternoon of January 30. Near high noon of that day William Goebel was assassinated in the Capitol grounds, while on his way to the Senate of Kentucky.

Under these circumstances the cases were submitted without argument.

It may, or may not have been, an abuse of discretion to thus submit without argument, or to prevent the plaintiffs in error from introducing their witnesses to the number of *two thousand*, which, it is alleged, they desired to do; but when the fact is recalled that it required fifteen days to hear one hundred and fifty witnesses; that the session of the General Assembly which began January 2, 1900, was limited to sixty days, and that one-half of this time had already expired, it is apparent that it would have been impossible to hear the witnesses of plaintiffs in error within the limits of the session. By law the board was dissolved by the termination of the legislative session.

But at most these rulings of the board were errors or mistakes of judgment, by the officers charged with the administration of the law, and do not authorize this court to assume jurisdiction upon the ground of the faliure of due process. This court could not review the orders and rulings of an inferior judicial tribunal of the State under like circumstances, and for this cause, has no jurisdiction to revise the action of the Board of Contest or the General Assembly. This rule is well settled.

> "If the State *provides* 'due process,' and does not deny 'equal protection,' and the *State court departs from these statutory provisions by an erroneous decision, there is no relief.* The State has not failed to provide 'due process,' but its court *has* against its legal provisions." (Tucker on Con., Sec. 390.)
>
> "The statute under which the court acted would have furnished Arrowsmith all the protection which had been guaranteed to him by the Constitution of the United States. The Legislature of a State performs its whole duty under the Constitution when it provides a law for the government of its courts, while exercising their respective jurisdictions, which, if followed, will furnish the parties the *necessary constitutional protection. All after*

that pertains to the courts." (Arrowsmith v. Harmoning, 118 U. S., 243.)

"The question before us is not whether the courts below, having jurisdiction of the case and the parties, *have followed the law*, but whether the law, if followed, would have furnished Kennard *the protection guaranteed by the Constitution.* Irregularities and mere errors in the proceedings, can only be corrected in the State courts. *Our authority does not extend beyond an examination of the power of the courts below to proceed at all.*" (Kennard v. Louisiana, 92 U. S., 480.)

The Constitution and statute of the State having provided a tribunal to determine the contest, and having regulated the procedure therein, and "due process" and "equal protection" having been provided by this law, the errors of the board, if any, in the discharge of its duties, under the law, do not confer jurisdiction here. The deprivation of an office, or of property, by the erroneous judgment of such a tribunal is not within the inhibition of the fourteenth amendment.

In the leading case of Wilson v. North Carolina, 169 U. S., 586, it appeared that by a statute of the State of North Carolina the Governor was authorized, without notice or hearing, to suspend one or more of the Railroad Commissioners, and make report of the fact, together with the reason for the suspension, to the next General Assembly, which was invested with the power to remove such commissioner. The Governor was authorized, in the meantime, to fill the vacancy in the office created by the suspension.

In the exercise of this power the Governor suspended Wilson, one of the commissioners, and notified him of the fact. He demanded the charges against him and the right to be heard. His demand was refused by the Governor, who filled the vacancy by the appointment of another commissioner.

Wilson declined to surrender the office, and an action, in the nature of quo warranto, was brought against him. He defended upon the ground that he had been deprived of his office, without due process of law, and deprived of the equal protec-

tion of the law, in violation of the fourteenth amendment to the Constitution of United States.

The case came before this court on a writ of error. On motion to dismiss for want of jurisdiction, because the record did not present a Federal question, the court said:

> "We are of opinion that the plaintiff in error was ***not deprived of any right guaranteed to him by the Federal Constitution, by reason of the proceeding before the Governor***, under the statute above mentioned, and resulting in his suspension from office.
>
> "The procedure was in accordance with the Constitution and laws of the State. It was taken under a valid statute, creating a State office in a constitutional manner, as the State court has held. ***What kind and how much*** of a hearing the officer should have before suspension by the Governor was a matter for the ***State Legislature to determine, having regard to the Constitution of the State.***
>
> "In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely State purposes, and of the terms upon which it shall be held by the person filling the office. And in such matters the decision of the State court, that the procedure by which an officer has been suspended or removed, was regular, and was under a constitutional and valid statute, must generally ***be conclusive on this court.***

This opinion seems conclusive of the question here. The statute there upheld vested in the Governor the power to suspend without notice or hearing, while the power to remove the official was vested in the General Assembly. If this be due process of law, and be not the exercise of arbitrary power, it would seem to follow that a procedure which provides for a hearing, after notice, before the Contest Board and the General Assembly, was legally sufficient. While the statute did not authorize the *removal* of the commissioner by the Governor, but only his *suspension*, the principle is the same. The suspension may be for a year, or longer, until the General As-

sembly shall convene. To deprive the incumbent of his office for this length of time, by suspension, requires as great a stretch of power as to remove him altogether.

The office of Governor was created by the Constitution. The powers and duties pertaining to the office are prescribed by that instrument. When a citizen becomes a candidate for that office, and, being elected thereto, accepts it, he does so subject to these provisions of the Constitution, and consents that if his election is contested that the contest shall be determined by the General Assembly. To borrow an expression from the court in the case just cited, these are the terms upon which the office is held. Even if the office be considered property, the title is conferred and accepted, subject to be divested by the procedure provided by the Constitution, which creates it. In this respect there is a marked difference between the deprivation of an office by a procedure prescribed by the Constitution, which creates the office, and the taking of property by such procedure. Property is not created by the Constitution, nor does the citizen hold title by virtue of that instrument. To deprive one of his property is, therefore, a different thing from depriving him of his office.

But the great weight of authority is that there is *no property in an office*, and hence the deprivation of an office, without due process, does not fall within the inhibition of the Constitution.

In the leading case of Smith v. Mayor, 37 N. Y., 520, the court said:

> "An office is simply an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation. Both the office itself and the compensation, upon general principles of law, are entirely within the control of the government, to diminish, increase or abolish. So it may, at any moment, be given up by the incumbent. There can be neither *property nor contract* in such a subject."

The Court of Appeals of Kentucky has adopted this view.

In the case of Standeford v. Wingate, 2 Duvall, 443, it was said:

> "An office established and held for the public good is not a contract, nor its tenure secured by any binding contract; the incumbent functionaries hold not by contract, but at the will of the Legislature."

The following cases hold that an office is not property, and may be abolished by the power which created it:

State v. Hawkins, 44 Ohio St., 109;

State v. Davis, 44 Mo., 129;

Conner v. Mayor, 5 N. Y., 296;

State v. Douglass, 26 Wis., 431.

In the case of Wilson v. North Carolina, 169 U. S., 586, this court held that it was concluded by the decision of the Supreme Court of that State as to the proper construction of the statute there drawn in question, and that this statute was not violative of the Constitution of North Carolina. The only question left for review, then, was stated by the court to be whether the plaintiff in error had been deprived of his property without due process of law.

The only property involved, and which it was claimed the plaintiff in error had been deprived of, was *his office*. While this court did not distinctly decide that an office is not property within the meaning of the fourteenth amendment, yet the court said:

> "Upon the case made by the plaintiff in error the Federal question which he attempts to raise is so *unfounded, in substance*, that we are justified in saying that it does not really exist; that there is no fair color for claiming that *his rights, under the Federal Constitution*, have been violated, either by depriving him of his property, without due process of law, or by denying to him the equal protection of the laws."

Finally, this court said in the Wilson case:

> "We should be very reluctant to decide that we had

> jurisdiction in such a case, and thus, in an action of *this nature, to supervise and review the political administration* of a State government, by its own officials, and through its own courts."

If such jurisdiction should be assumed by this court it is respectfully suggested that the consequences would be disastrous. The determination of the result of an election is purely a political question, and the agencies provided by the several States for decision of contested elections are summary in their nature. The object was to prevent the delays incident to procedure in the courts, and to relieve the ordinary tribunals of justice from the excitement which these cases usually beget. But if jurisdiction is assumed in this case, it may well be asked, where will it end?

The Constitutions of the several States contain provisions similar to section 38 of the Kentucky Constitution, by which it is provided that—

> "Each House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law."

The phraseology of this section is substantially the same as section 90, relating to contested elections for Governor and Lieutenant-Governor. If the seat of a member of the General Assembly should be contested and the House to which he belonged, on hearing the contest, should unseat him, might he not maintain an action, and alleging his election and induction into office, aver that the General Assembly ousted him in pursuance to a conspiracy, or that there was no evidence before it of the grounds of contest alleged, or that a quorum was not present, or that the House refused to hear argument, or that the committee refused to hear evidence or argument, or that it was not fairly drawn, by lot, or that it was composed of the partisan friends of the contestant, or members who had advised the contest, or that, finally, the majority which unseated him had agreed with the contestant, in ad-

vance, to unseat the contestee, and that the clerk of the House had also joined the conspiracy and had fraudulently and falsely kept the journal so as to conceal the facts? Might it not be alleged in such a petition, as it has been here, that by the arbitrary power of the General Assembly, and without due process of law, the contestee had been deprived of his property, and the people of the Commonwealth who elected him had also been deprived of their political liberty?

If the relief asked here may be granted, the action suggested may be maintained, and if this case raises a Federal question, so would that. If a member of the General Assembly, who may be unseated, can maintain the action, then a member of the Congress of the United States may, upon similar allegations, also sue, and all these cases find their way to this court for final determination.

If this court shall hold that it has jurisdiction, the apprehensions expressed by Mr. Justice Miller, in Davidson v. New Orleans, 96 U. S., 104, may be realized. Concerning the number and character of the cases which have been brought here under the fourteenth amendment, he said:

> "In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every *unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.*"

If to the vast number of cases of which the courts have jurisdiction shall be added the cases which will arise in contested elections, the numbers will be increased beyond even the apprehension of the learned justice, who certainly viewed with alarm the crowded dockets of this court. Confusion and interruption of the public affairs of the States will follow this flood of litigation, and the conflicting claims of rival officials will doubtless result in violence or bloodshed during the delays

incident to appeals, for it is safe to say that all cases can not, or will not, be speeded as these have been.

It is insisted that the motion to dismiss the writ should be sustained, because there is no color of a Federal question presented; but inasmuch as the case is heard on the merits, as well as on the motion, further argument will be presented on other questions which arise on the record.

III. THE JUDGMENT OF THE GENERAL ASSEMBLY IS CONCLUSIVE.

The defendant in error, J. C. W. Beckham, claims title to the office of Governor, by succession from William Goebel. The title of Goebel, as Governor, and of Beckham, as Lieutenant-Governor, is shown by the journals of the two Houses of the General Assembly. Defense to the action has been made, and the force of the facts shown by the journals sought to be avoided by allegations of fraud, not only against the members of the Boards of Contests, but against all the members of the General Assembly—seventy-five in number—who voted for the approval and adoption of the report of the boards.

By section 90 of the Constitution of Kentucky, and the statutes passed in pursuance thereof, the General Assembly has been clothed with exclusive and final jurisdiction of contests for the offices of Governor and Lieutenant-Governor.

No other tribunal or court, under any form of proceeding, or in any mode, has jurisdiction to determine the questions involved, or review the action of the General Assembly. Its judgment is conclusive; its jurisdiction is exclusive.

Upon the ground of public policy the law makers have invested the General Assembly with this plenary and final jurisdiction for the determination of these contests. No provision is made for an appeal or review by the judicial tribunals, because it was not intended that they should have jurisdiction over the contest.

This is the universal rule as to the ordinary tribunals created for the trial of contested elections. Thus, in Batman v. Me-

gowan, 1 Met., 533, which was a proceeding by mandamus to compel the County Contest Board to take action, this court held that in the absence of a statute allowing an appeal, the decision of the Contesting Board was final and conclusive as to all questions, both of law and fact. The courts can not, in the absence of direct authority, adjudicate such questions, or decide such contests.

In the case of Stine v. Berry, 96 Ky., 63, the court reaffirmed this rule. It said:

> "We understand, and so adjudge, that the statute in regard to contested elections for State and county offices is exclusive, and that when a mode of contest is provided in a city charter for contesting the election of city officers it excludes any other remedy. Such statutes are enacted with remedies providing for the speedy determination of such questions, and to take from the courts all original supervisory power over such contests."

In this last case the contest was concerning the office of Mayor of the city of Newport. The contest was determined by the city council, under an ordinance which authorized it to hear and determine the contest for city officers. No appeal to the courts or other tribunals was provided for. Concerning an objection, based upon this ground, the court said:

> "The fact that the city charter fails to give either party the right of appeal from the decision of the contesting board can make no difference; it was the remedy provided by the city charter, and was deemed ample protection by the Legislature."

Much has been said in this case, in argument, against the exclusive jurisdiction of the General Assembly, because no appeal is provided for by the Constitution or statute. It has been insisted for this reason that there is implied power or jurisdiction in the courts to review the proceedings upon an allegation of fraud, or denial of due process of law. But these cases conclusively establish the contrary doctrine.

The purpose of excluding the trial of contests from the courts was said, in Newcum v. Kirtly, 13 B. Mon., 517—

> "To prevent the ordinary tribunals of justice from being harrassed, and indeed overwhelmed, with investigations, and involved in the excitements to which these cases may be expected to give rise."

And in the Batman case it was said that—

> "The Legislature evidently intended to accomplish a two-fold purpose: A speedy and summary mode of deciding cases of contested elections and determining finally and conclusively which one of the claimants was entitled to the office."

For the same reasons, and upon the same views of public policy, the makers of the Constitution conferred exclusive jurisdiction upon the General Assembly to determine the contests for the offices of Governor and Lieutenant-Governor. The provisions of the Constitution and of the statute relating to these contests accord with the settled policy of the State for more than a century. If a speedy determination of the contests for minor county offices be of such importance, how much more important is it to the people of the Commonwealth that a contest involving the offices of Governor and Lieutenant-Governor should be speedily settled? It is of more importance, indeed, to the Commonwealth that the contest should be settled in a summary way than that it should be determined in favor of the one or the other of the parties to it.

In the leading case of Baxter v. Brooks, 29 Ark., 182, the court held that the jurisdiction of the General Assembly, under the Constitution of the State, to try and determine contests for the office of Governor was exclusive, and that the courts had no power or authority to review the legislative action. In that case the court said:

> "The office of Governor does not exist by common law. It is a creation of the Constitution. And it is well settled that where a new right, or the means of acquiring it, is conferred by a Constitution or a statute, and an adequate

remedy for its infringement is given by the same authority which created the right, the parties injured are confined to the redress thus given."

In a review of this contest, quoted in the opinion, Judge Cooley said:

"To our mind there can be *no plausible suggestion* that the decision of the General Assembly on *such a contest is open to judicial review afterwards.*"

In an exhaustive opinion, also quoted at length by the court, Hon. Geo. H. Williams, Attorney-General of the United States at the time, concurred with the court and with Judge Cooley in holding that the determination of the contest by the General Assembly was not subject to judicial review.

The same rule was announced and adhered to by the Supreme Court of Ohio, in Grisel v. Marlow, 15 Ohio St., 114; and in Stearns v. Wyoming, 53 Ohio St., 352, the rule was upheld and applied to the determination of a contested election by a city council; and the Supreme Court of Louisiana, in Reynolds v. Ouachita, 11 South. Rep., 236, declared that in the absence of statutory authority the court could neither review nor determine election contests.

This court, in Martin v. Mott, 12 Wheat., 19, in an opinion by Judge Story, said:

"Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the Constitution constitutes him the sole and exclusive judge of the existence of those facts."

So it is here. By law the General Assembly has been constituted the sole and exclusive judge of the matter of law and of fact involved in a contest for these offices, and its determination is final and conclusive. But it was urged in the court below, with great earnestness, that, although there be no appeal allowed, the courts have the right, upon an allegation of fraud, to review the determination of the General Assembly

in these contests, just as the judgment of a court might be reviewed. This extraordinary and revolutionary proposition brings me to a discussion of the question whether the journals showing the decision of the General Assembly may be impeached or contradicted.

IV. THE LEGISLATIVE JOURNALS IMPORT VERITY.

The proposition contended for by plantiffs in error is that the courts may go behind the journals and investigate the alleged facts.

Has the judiciary the jurisdiction or power to institute and conduct such an inquiry? If so, whence is it derived? It is believed that the right has been asserted, in this case, for the first time in the history of the Commonwealth, and in view of the importance of the question, and its effect upon this case, it is proper that it should receive careful consideration by counsel and court.

By section 27 of the Constitution the powers of the government of the Commonwealth were divided into three distinct departments, and each of them was confided to a separate body of magistracy: "Those which are legislative to one, those which are executive to another, and those which are judicial to another." Each of these departments is separate and distinct from the others, and by section 28, as a further guaranty against interference, it is provided that "no person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to the others, except in the instances hereinafter directed or permitted."

By these provisions of the Constitution the independence of each department of the government was secured. The proposition underlying the grounds of defense here, if sustained, would strip the legislative department of this independence, and render it subject to the arbitrary will of each of the other departments. If the motives of the General Assembly may be inquired into in respect to *one* or *any* of its acts, it would seem to follow that such inquiry may be made concerning *all of its*

actions and proceedings. If it may be adjourned once by the arbitrary will of the Governor, it may be adjourned an indefinite number of times to an indefinite number of places, and thus prevented by a corrupt executive from the orderly discharge of its duties at any time or place. If permitted by the executive to remain in session, at any time or place long enough to enact a law, or discharge any other duty imposed upon it, the courts may hold its proceedings void because of supposed corruption of its members.

If the powers, thus asserted, exist in the executive and judicial departments of the government, the General Assembly can never remain in session at any time or place except by the consent of the Governor, and can take no step or proceeding in the discharge of its official duty except its motives may be questioned by the courts. Instead of being an independent coordinate branch of the government, all the powers of the General Assembly would be exercised in subordination of the other departments.

The policy of our Constitution and laws has assigned to the different departments of the State government distinct and different duties, in the performance of which they are entirely independent of each other; so that whatever power or duty is expressly given or imposed upon one of these departments is altogether free from the interference of either of the others. Especially is this the case when the subject is committed to the discretion of either department. Each official is responsible for the discharge of his duty, not to the courts, but to the people, and the motives which induced him to act may not be inquired into by any member of another department.

Mr. Cooley has stated the rule as follows:

> "Although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the Legislature where fraud and corruption were alleged, and annul their action, if the allegations were established, the argument has, in no case, been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which preclude an inquiry into the motives of the Governor, in the

> exercise of a discretion invested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people." (Cooley's Con. Lim., p. 228.)

This statement of the rule by the most eminent commentator upon constitutional law which our country has produced finds support in the decision of every court before which the question has been presented.

By section 40 of the Constitution of Kentucky it is provided that—

> "Each House of the General Assembly shall keep and publish daily a journal of its proceedings."

The universal rule is that this journal imports absolute verity, and may not be impeached or contradicted in the courts, upon an allegation of fraud or mistake. The rule rests upon the ground that the legal effect of the record of the General Assembly, solemnly made in pursuance to the mandate of the Constitution, can not be denied or destroyed by judicial action. The rule applies whether the action of the General Assembly is assailed in the passage of a law, or the performance of any other duty imposed by the Constitution. The reason for the rule is that the General Assembly is an independent department of the government, and if its actions may be questioned by the judiciary, or the verity of its records denied, this independence will thereby be destroyed.

In this case every fact upon which the title to the office of Governor depends is shown by the journals. If they can not be impeached, there is an end of this controversy. If they may be, it has scarcely begun.

It may be asserted that the courts, State and Federal, are in perfect harmony in support of the proposition laid down by Judge Cooley. The rule not only applies when a law passed by the Legislature, or Congress, is questioned, but also when any act done by either body, and shown by the journal, is assailed. The statements of the journals import absolute verity in such case.

Thus in Tameling v. United States Freehold Company, 93

U. S., 644, it appeared that Congress reserved to itself the determination of conflicting land claims, under Mexican grants, in New Mexico and Arizona, and had provided by law that the Surveyor-General for the Territory should hear evidence and report to Congress the origin, nature and extent of such claims, together with his opinion as to their validity. The action and decision of the Surveyor-General, and the determination by Congress, in each case, was held conclusive. In passing on the question the court said:

> "No jurisdiction over such claims was conferred upon the court, but the Surveyor-General, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on such claim, reserved to Congress, is, of course, conclusive, and, therefore, not subject to review in this, or any other, forum. It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the Surveyor-General, or his decision declaring the validity of the grant."

Under this authority the finding of fact by the Contest Boards, reported to each House of the General Assembly and shown by the journals, is protected from impeachment, as well as the action of the General Assembly. The Contest Board occupies the same attitude toward the General Assembly under the Constitution and laws of Kentucky which the Surveyor-General occupied toward Congress. The report of each was in like manner protected.

In the case of the United States v. The Old Settlers, 148 U. S., 466, the court said:

> "It is not within the province of a court, either of law or equity, to determine that a treaty, or an act of Congress, had been procured by duress or fraud, and declare it inoperative for that reason."

So in the case of the United States v. The Des Moines Company, 124 U. S., 544, in passing upon this point the court declared that—

> "*The knowledge and good faith of a Legislature are not open to question. It is conclusively presumed that a Legislature acts with full knowledge and in good faith.* It is true that the bill alleges that the act was induced by the Navigation Company, by false representations and threats of suits; but *such allegations amount to nothing.*"

So it is with the averments as to the legislative action in this case. Being opposed to the conclusive presumption which this court has said exists as to the good faith and knowledge of the General Assembly, they "amount to nothing." Relying upon this solemn declaration of this court, defendants in error, *for the purpose of the demurrer only*, but not because they were true, admitted these allegations. This course was pursued by counsel as the only speedy way of reaching a determination of these cases, which otherwise would have exhausted the patience of the people of the Commonwealth, as well as the parties and counsel.

The rule is thus clearly established in the Federal courts. In the State courts the same doctrine has been announced without dissent, and sustained by the clearest and most forcible reasoning.

McCullogh v. State, 11 Ind., 425, was a proceeding by quo warranto against certain persons claiming to exercise a franchise under an act of the General Assembly of the State. It was charged that the act did not receive the votes of certain-named members of the General Assembly, but that their *names were fraudulently recorded in the journal as having been present and voting for the bill.* The court said:

> "The facts thus alleged raise the question whether the journals of the Houses of the General Assembly can be contradicted or impeached on the ground of fraud or mistake. The affirmative of this inquiry can not, in our opinion, be maintained. Article 4, section 12 of the Constitution requires each House to keep a journal of its proceedings, and publish the same. This journal must be held

conclusive evidence of the facts which appear on its face, because it must be presumed that the members, as a body, inspected it and made all necessary corrections before they allowed it to assume the character of a journal of their proceedings. As well might evidence be received to contradict a statute, to show that it contained certain provisions inserted through mistake, as to contradict an entry upon the journal.

"The House keeping the journal is the *only tribunal by which it can be corrected*, and until corrected, by such authority, it must be considered *conclusive as to the facts which it contains*.

"We must, therefore, hold that the members alleged to have been absent when the bill passed over the veto of the Governor *were present and voted*, as averred in the journal; and that McMuney *did* vote in favor of the bill on its final passage, in the House."

Wright v. Defrees, 8 Ind., 298, was likewise a quo warranto proceeding against certain persons to prevent them from exercising a franchise under an act of the General Assembly. The complaint alleged that the act referred to was procured to be passed by the General Assembly "by fraud, corruption and bribery." In passing on the question thus presented the court said:

"The powers of the three departments are not merely equal—they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. It is now proposed that one of the three powers shall institute an inquiry into the conduct of another department, and form an issue to try by what motives the legislators were governed in the enactment of a law. If this may be done, we may also inquire by what motives the executive is induced to approve a bill, or withhold his approval; and, in case of withholding it corruptly, by our mandate compel its approval. To institute the proposed inquiry would be a direct attack upon the independence of the Legislature, and a usurpation of power subversive of the Constitution."

The doubt expressed in this case as to whether the State might not have some right, in a proceeding of this character, which the citizen did not have was directly considered by the same court in the case of McCullogh v. State, just cited, where the court said:

> "We know of no principle or authority upon which *an issue of that character can, in any case, be tried before a judicial tribunal.*"

In the case of State v. Moffitt, 5 Ohio, 223, the question was first presented in that State. By the Constitution it was provided that certain-named judges should "be appointed by joint ballot of both Houses of the General Assembly." The journal of the House of Representatives showed that Samuel Moffitt was elected, as one of said judges, while the journal of the Senate showed the election of Lemuel Moffitt. Lemuel Moffitt qualified, and a proceeding of quo warranto was instituted against him. He showed by the depositions of members and officers of the General Assembly that Lemuel and not Samuel Moffit was the individual voted for and elected.

The court held that the journal could not be contradicted by parol.

> "The testimony of an individual member could not be received to contradict a statute, and if not, why receive it to contradict an entry upon the journal?"

The Court of Appeals of Kentucky, in passing upon this question, said:

> "We have no more right to supervise the decision of the General Assembly in determining the result of this election than we have to supervise the action of the Governor in calling a special session of the Legislature, or in pardoning a criminal, or the action of the Legislature in contracting debts, or determining upon the election of its members, or in doing any other act authorized by the Constitution." (Vol. 1, p. 150, Tr.)

In the Sunbury & Erie R. R. Co. v. Cooper, 33 Penn. St.,

283, an act of the General Assembly was attacked for fraud. In passing on the question, the court said:

> "May the judiciary sit in judgment upon a charge that the legislators have been faithless to their oaths, to the Constitution and to the public interests, by passing a law that is a fraud upon the State? This question was not discussed, and yet unless it can receive an affirmative answer all the argument, on this branch of the subject, must be regarded as out of place.
>
> "We can not hesitate one moment on this question. We have no such authority, and ought not to have. However far the Legislature may depart from the right line of constitutional morality, we have no authority to supervise and correct their acts, on the mere ground of fraudulent or dishonest motives. We know of no such check upon legislation, and would not desire to have such a one instituted. The remedy for such an evil is in the hands of the people alone, to be worked out by an increased care to elect representatives that are honest and capable. If the judiciary have such authority, then any justice of the peace is competent to sit in judgment upon any act of legislation which disorderly moralists, or knavish or ignorant anarchists, may choose to charge as fraudulent. Nay, more; if the question may be raised in a judicial proceeding, the judges and justices of the peace will be bound to investigate and decide it; and the principal judicial business might then become that of testing, not cases by the standard of the law, but the standard itself by the infinitely various and uncertain judicial notions of morality."

In Wise v. Bigger, 79 Va., 269, this question was presented and passed upon by the Supreme Court of Virginia. The case was mandamus to compel the clerk to strike from the rolls a certain act of the General Assembly upon the ground that it did not receive the requisite number of votes. The court held that it could not—

> "Inquire into or dispute the veracity of the certificate, and that the evidence furnished in the journal of the pro-

ceedings of the Senate imports absolute verity, and can not be disputed."

In Attorney-General v. Rice, 64 Mich., 385, it appeared that, as a matter of fact, the title of a bill to organize a specified township was introduced, and afterward a bill was substituted to organize a different township. The court said:

"The question then arises, can it be shown, by parol, in contradiction of the legislative journal, that in fact a skeleton bill, or no bill at all, was introduced? The Constitution provides that 'each House shall keep a journal of its proceedings, and publish the same except such parts as may require secrecy.'

"Are these journals kept by the clerks of each House, and read and corrected each day by each body and duly certified by the proper officers to be correct, to stand as conclusive evidence of their proceedings, or are they liable to be disputed and overthrown by parol testimony, either of individual officers and members, or of strangers, who may be interested in nullifying legislative action? It would seem that there can be but one answer. The legislative record must prevail. Any other ruling would necessarily lead to dangerous and alarming results."

In Pangbaum v. Young, 32 N. J., 40, the court said:

"In the structure of the government of this State the judicial and legislative departments are made co-equal, and it nowhere appears that the one has the right of supervision over the other. It is true, as was much pressed on the argument, that the Legislative branch may willfully infringe constitutional prescriptions. But the capacity to abuse power is a defect inherent in every human government, and yet nevertheless the forces of government must be reposed in some hands. The prerogative to make, to execute and to expound the laws must reside somewhere. Depositories of these great national trusts must be found, though it is certain that such depositories may betray the confidence thus reposed in them. In the frame of our State government the recipients and organs of

this three-fold power are the legislature, the executive and the judiciary, and they are co-ordinate—in all things equal and independent; each within its sphere is the trusted agent of the public. With what propriety, then, is it claimed that the judicial branch can erect itself into the custodian of the good faith of the legislative department? It is to be borne in mind that the point now touched does not relate to the capacity to pronounce a law, which is admitted to have been enacted, void, by reason of unconstitutionality. That is clearly a function of judicature. But the proposition is, whether, when the legislature *has certified to a mere matter of fact relating to its own conduct and within its own cognizance, the courts of the State are at liberty to inquire into or dispute the veracity of that certificate.* I can discover nothing in the provisions of the Constitution, or in the general principles of government, which will justify the assumption of such superior authority."

To these authorities may be added many others:
Cohn v. Kingsley, 38 L. R. A., 78;
Carr v. Coke, 28 L. R. A., 737;
Blaine Co. v. Herr, 45 Pac. Rep., 890;
State v. Cordozo, 5 Rich., 312;
Humbolt Co. v. Churchill, 5 Nev., 339;
Spear v. Major, 85 Ga., 49;
Grisel v. Marlow, 15 Ohio St., 114.

There is no authority, State or Federal, to be found which will authorize the impeachment of the legislative journals, nor sustain the collateral attack upon the final judgment of the General Assembly, whether it be the passage of a law or any other official act. In Kentucky a judgment may be assailed and set aside for fraud, but it must be by proceedings in the court which rendered such judgment. The forum in which the fraud was committed may correct it. But here the appeal is to the judiciary to set aside a solemn determination made by the General Assembly which, by the Constitution, has exclusive jurisdiction of the matter. When a judgment is set aside for fraud, by a court, a new trial is granted to the complaining

party. If the judgment of the General Assembly shall be set aside, will the court order it to again assemble and retry the contest? If so, whence is this power to convene the General Assembly in extraordinary session derived?

The decision of the General Assembly, considered simply as a judgment, can not be collaterally attacked—the journals which evidence this judgment may not be impeached.

Happily for us, the extraordinary contention of appellants has never received the sanction of any court, Federal or State. Whatever may be the difference of opinion as to whether the General Assembly decided correctly the questions of fact submitted to it, in the contested election case, there can be no serious question that the law will allow no collateral attack upon the solemn judgment which ended that memorable contest. No authority has been produced at any hearing of this case, and none can be found, in which any court has sustained its jurisdiction to inquire into the motives which actuated the members of the General Assembly, in the discharge of their duties.

A sufficient answer to all that counsel have said as to the alleged wrongs without remedy, unless this court shall assume jurisdiction of this case, is found in the words of the late distinguished Chief Justice of this court:

> "For protection against abuses by Legislatures the people must resort to the *polls*, not to the *courts*." (Munn v. Illinois, 94 U. S., 134.)

V. THE POWER OF THE GOVERNOR TO ADJOURN THE GENERAL ASSEMBLY.

It is insisted by the plaintiffs in error that Wm. S. Taylor, as Governor, on the 31st day of January, 1900, by proclamation, adjourned the General Assembly, then in regular session in the city of Frankfort, to the town of London, in Laurel county, until February 6, 1900, and that consequently the action taken by the General Assembly in determining the contests, on the 2d day of February, 1900, was void.

Did the Governor possess the extraordinary power to adjourn the General Assembly on the 31st day of January, when its regular session was unfinished? The authority to adjourn is plead and relied upon in the answer for the purpose of avoiding the legal effect of the determination of the contest by the General Assembly. It has been, in like manner, urged as the only possible excuse for the flagrant act of the appellant in refusing to allow the General Assembly to convene in its halls, in the Capitol, and in dispersing it at the point of the bayonet.

By section 29 of the Constitution the General Assembly is invested with all the legislative power of the Commonwealth. As a sovereign body, it may, therefore, meet and adjourn when and where it will, unless there be some limitation upon its powers contained in the Constitution, or authority to control its adjournment is vested elsewhere.

By section 41 of the Constitution it is provided that—

> "Neither house, during the session of the General Assembly, shall, without the consent of the other, adjourn for more than three days nor to any other place than that in which it may be sitting."

It will be observed that the only limitation here provided for is the concurrence of both Houses. With this concurrence the General Assembly may adjourn for more than three days —that is, indefinitely—and to some other place than that in which it may be sitting. The exercise of this power of adjournment may not be interfered with by the Governor. His consent to or approval of the resolution of adjournment is not necessary, for by section 89 of the Constitution resolutions of adjourment are not required to be approved by the Governor.

The only connection the executive has with the adjournment of the General Assembly is shown by section 80, which provides that—

> "In case of disagreement between the two Houses with respect to the *time of adjournment*, he may adjourn them to such time as he shall think proper, not exceeding four months."

This power is granted only in case of a "disagreement between the two Houses with respect to the *'time'* of adjournment," but not with respect to the *"place."* It, therefore, follows that even if the Governor, in case of a disagreement as to the time of adjournment, should exercise the power granted to him by section 80 of the Constitution, he could not adjourn the General Assembly to any *"other place"* than that in which it was sitting.

The only authority that the Governor has to change the place in which the General Assembly shall convene is contained in section 36 of the Constitution, where it is provided that "in case of war, insurrection or pestilence" it may, "by proclamation of the Governor, assemble for the time being, elsewhere." This manifestly refers to a time when the General Assembly is not in session, for the act of meeting elsewhere, if in session, would be an *adjournment* and not an *assembling*. When the General Assembly is not in session, this power is granted, in order that it may not be compelled to convene at the seat of government, in case of war, insurrection or pestilence; but when in session, the General Assembly, as a sovereign body, can take care of itself, and adjourn when and where it pleases to avoid war, insurrection and pestilence. If there be no disagreement between the two Houses with respect to the *time* of adjournment, the Governor has no power whatever to adjourn them.

In 1862, when Gen. Bragg invaded the State and the Confederates threatened the city of Frankfort, the Legislature was in session, and without proclamation or order from the Governor, adjourned to meet in Louisville. The provisions of the Constitution then in force upon this subject were the same as those in the present Constitution. This precedent is valuable, in that it shows the interpretation placed upon these sections of the Constitution by both the legislative and executive departments.

Section 41 of the Constitution was taken word for word from the Federal Constitution. In commenting on the section and the power of Congress and the President, Judge Story said:

"It is observable that the duration of each session of Congress (subject to the constitutional termination of their official agency) depends solely upon their own *will and pleasure*, with the single exception, as will be presently seen, of cases in which the two Houses *disagree, in respect of the time of adjournment.* In no other case is the President allowed to interfere with the time and extent of their deliberations. And thus their independence is effectually guarded against any encroachment on the part of the executive."

It is clear from these provisions of the Constitution that section 36 was only intended to provide a place for the General Assembly to meet in the event that it was found unsafe to assemble at the seat of government. As it could not control its movements until organized, it was necessary for some one to have power to designate a meeting place, in the event of war, insurrection or pestilence. This power was conferred on the Governor. It is clear that it was not intended for him to have the power to adjourn the General Assembly *after* it was organized (except in the case of disagreement between the Houses, as provided in section 80), for the reason that he might fix *one time and place* and the General Assembly, by virtue of section 41, might fix *another time and place.* This would not only create confusion, but destroy the independence of the legislative department of the government. For it is manifest that if the Governor can adjourn the General Assembly six days, in the midst of a regular session, he may adjourn it for an indefinite time. If he may adjourn it to London, in Laurel county, as soon as it shall assemble there, he may adjourn it to some other point, and thus fritter away the entire time of the session. Such a humiliating spectacle was never presented in an American Commonwealth as Kentucky witnessed, when the plaintiff in error attempted the adjournment of the General Assembly by a proclamation, read to it by his Adjutant-General, surrounded by bayonets!

These provisions of the Constitution, State and Federal, are for the protection of the legislative departments of the govern-

ment from the encroachments of the executive. The makers of these venerable instruments had in mind the fact that the English Kings exercised arbitrary power over the Parliament, and that the royal colonial Governors exercised like powers over the legislative assemblies held in the colonies; and hence it was set forth, in the Declaration of Independence, as one of our grievances, that legislative bodies had been called together "at places unusual, uncomfortable and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance;" and that the King had "dissolved representative Houses repeatedly, for opposing, with manly firmness, his invasions of the rights of the people."

With these abuses in mind, the framers of our Constitution were careful to provide for the independence of the legislative department of the government. It would be passing strange, if in State and Federal Constitutions, the executive was nevertheless allowed to retain the extraordinary powers which the Kings exercised through the colonial Governors, and of which our forefathers so stoutly complained!

The questions involved in these causes are of supreme importance, not only to the citizens of the Commonwealth of Kentucky, but to the people of every State in the Union. It is not simply a question whether the plaintiffs or the defendants in error shall discharge the duties of the offices involved, but the supremely important question is:

Shall the Constitution of the Commonwealth remain inviolate, and each department of the government, established thereby, continue to exercise its legitimate functions and powers? Does this chart of our liberty, formed at the birth of the Commonwealth by the wisdom of our forefathers, and amended since as experience has pointed out, contain the fatal gift of power to one department of the government by which it may strip another department of authority and nullify its action? In a word, does the exercise of its functions by the legislative department of our government depend upon the consent of the executive, or may its solemn act, done in discharge of unquestioned duty, be assailed by the judiciary on the ground of fraud? Can the judiciary question the motives

of the legislative department, and declare that because of an alleged political conspiracy it has corruptly discharged its duty, and thereupon adjudge its action null and void? Can the executive disperse the legislature at the point of the bayonet, while in the orderly discharge of its duties, and adjourn it to whatsoever point may suit his own corrupt purpose?

If these extraordinary powers are possessed by the judiciary and the executive, then it is a mistake to talk about the three departments of the government being each equally sovereign in the exercise of jurisdiction. If this power exists over the legislative department, the construction given to the Constitutions of the States and to the Federal Constitution itself must be revised; the people of Kentucky should understand that the law making power can only assemble, at any time or place, and remain in session by the will of the executive; that he can corruptly disperse it, if need be by force, and while its own motives may be questioned by the judiciary, it may not question, but must obey, the edict of the executive. The people of Kentucky should also understand that any act of the legislative department may be set aside by the judiciary, not alone because it conflicts with the Constitution, but because, in the opinion of the judiciary, the members of the Legislature were not actuated by proper motives; and we must further learn that while the motives of the members of the Legislature may be questioned, at any time, by the executive or judiciary, the Legislature can not question, in any event, the motives of judge or executive. If this contention is to prevail, then the legislative department, emasculated and shorn of its powers, is degraded from its position of co-ordinate sovereignty, and left only to register the will of judge or governor.

VI. THE PROCEEDINGS BEFORE THE GENERAL ASSEMBLY.

Counsel for plaintiffs in error assail the determination of the contest by the General Assembly as void, because, it is insisted, that it acted without evidence. The journals are silent

on this subject. "It must be presumed," said the Court of Appeals in its opinion in this case—

> "That the Legislature did its duty, and had before it such evidence as was satisfactory to it." (Vol. 1, p. 151, Tr.)

Judge Cooley says that where a Legislature acts, it must be assumed—

> "That *the legislative discretion has been properly exercised. If evidence is required, it must be supposed that it was before the Legislature when the act was passed;* and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding.
>
> "In those States where the enrolled bill is not held conclusive, it is uniformly held where the journals are merely silent that the *presumption is absolute that the required steps were taken.*" (Lafferty v. Huffman, 99 Ky., 88.)

The force of this authority is sought to be avoided by the statement that it only refers to the action of the Legislature in enacting laws. This is a mistake; but if true, it is clear that the principle is equally applicable here

Why is the action of the Legislature in enacting a law protected from attack? Simply because it is the act of an independent department of the government, in the discharge of its constitutional duty, and no other department has authority to question its action. The General Assembly on the 2d day of February, 1900, when it determined this contest, was in the discharge of a duty imposed upon it by the Constitution of the Commonwealth. Its good faith can not be questioned, nor can its act be assailed for lack of evidence. Its act in passing a law is of no higher dignity than in determining a contested election for Governor. It discharges a constitutionally imposed duty in each case, and its action is of the same dignity in the one case as in the other. The allegation—so much pressed upon the court—that the General Assembly acted

without any evidence, will not authorize the court to set aside its solemn adjudication. As for this allegation, it is sufficient to say, in the language of this court in the case of the United States v. The Des Moines Co., 124 U. S., 554, when discussing a similar pleading, that "*such allegations amount to nothing.*"

The action of the General Assembly is also assailed because the determination of the contest took place at a "secret session," as it is alleged, when certain members and plaintiffs in error were not notified. This objection is unavailing. The legislative record imports absolute verity, and its legal effect can not be destroyed by alleging want of notice of the time and place of the meeting.

In McCullogh v. State, 11 Ind., 425, it was alleged that certain members of the General Assembly were not present, and did not vote for a bill on its passage. The journal showed that they were present, and did vote. In Wise v. Bigger, 79 Va., 269, the allegation was that the bill did not receive the requisite number of votes to make it a law. The journal showed otherwise.

In both cases the courts held that the legislative record must prevail.

But are not the plaintiffs in error estopped to question the character of the meetings of the Houses of the General Assembly, at which this action was taken? The journals show that on the 31st day of January, 1900, the Senate and House of Representatives, were prevented, by an armed body of men, under the command of D. R. Collier, Adjutant-General, by order of William S. Taylor, Governor, from entering the halls, in the Capitol, in which their sessions were to be held; that they were prevented, by force, by the same body of armed men, from meeting at the Opera House and Courthouse, upon said day. These facts, alleged in the petition, are not denied in the answer. (Vol. 1, pp. 81, 85-6, Tr.)

This flagrant indignity, thus put upon the General Assembly of the Commonwealth, was a part of the effort of Taylor to adjourn it to London. His attempt to thus adjourn the General Assembly is now referred to in the brief of one of his

counsel as a *mistake*. If he deemed it wise and proper to adjourn the General Assembly to some other place in the Commonwealth, and, in good faith, supposed he had the power to do so, it would have been perfectly legitimate for him to have issued his proclamation, and thus announced the adjournment. Its legal effect could have been determined later.

In view of the solemn facts, shown by this record, it is remarkable that the plaintiffs in error should come before the courts as the self-appointed agents of the people, to protect them in the enjoyment of liberty and a republican form of government! What greater outrage upon liberty and a republican form of government is shown in the history of the English speaking people than this? The General Assembly, by order of the Governor, barred by bayonets from assembling, during a regular session, for the orderly discharge of their duties!

The 19th day of February, 1900, was the first day the General Assembly was permitted to convene in the Capitol, at Frankfort. On that day a resolution was adopted by the Senate, which recited the fact that William S. Taylor, on the 31st day of January, 1900—

> "By the use of armed force, dispersed the General Assembly, and has, until recently, prevented the Senate and House from assembling at their regular rooms and places of meeting; and, whereas, the General Assembly and each House thereof, after *public notice*, met in joint and separate sessions in the city of Frankfort, a full quorum of such bodies being present, and adopted the majority reports and resolutions of the Boards of Contest for Governor and Lieutenant-Governor of the Commonwealth of Kentucky, unseating the contestees, W. S. Taylor and John Marshall, as Governor and Lieutenant-Governor, and seating the contestants, William Goebel and J. C. W. Beckham, as Governor and Lieutenant-Governor, respectively, all of which proceedings, reports and resolutions are set out in the journals of the two Houses of the General Assembly; and,
>
> "Whereas, this joint assembly is now enabled to meet

in its regular place of meeting, and whilst it adheres to the belief, beyond doubt, that the action of the General Assembly heretofore taken in reference to said contests is valid, final and conclusive, to remove any doubt that may exist in the minds of any of the people of the Commonwealth; etc."

This recital is followed by a resolution ratifying the action of the General Assembly in determining the contest for Governor and Lieutenant-Governor.

On the 20th day of February this resolution was adopted in the House, and also by both Houses in joint session, and the resolution entered, at large, on the journals. These facts are alleged in the petition and not denied in the answer. (Vol. 1, pp. 7-8, Tr.)

The death of William Goebel did not abate the contest proceeding. By the Constitution of Kentucky (section 84) the right to discharge the duties of the office of Governor, in case of death, devolved upon the Lieutenant-Governor; J. C. W. Beckham, claiming to have been elected such Lieutenant-Governor, had an interest, and consequently a right, to prosecute the contest. But *the people* had a higher interest in the contest; this interest survived the death of the contestant, Goebel. Consequently the General Assembly had the power to adopt the resolution of ratification, and cure any omissions in their previous action. The meetings at which this was done were not secret.

Another ground of objection to the legislative determination of the contest is that the evidence did not authorize the finding. Of this, however, the General Assembly was the *exclusive judge*. This court has no jurisdiction to review the finding and weigh the evidence.

It may not be improper, however, to say that after an exhaustive analysis of the evidence, counsel arrives at the conclusion that there was *some* evidence of military intimidation and of tissue ballots. The record shows that many of these ballots, from five or six counties, were exhibited before the board *in evidence*. *They are not in the record now*. As to

this evidence, which was presented before the General Assembly, the court can not judge, if it would.

With desperate inconsistency the counsel for plaintiffs in error insist that the General Assembly had no power to determine the contest in the absence of the evidence, and at the same time it is insisted that this court should determine that there was *no evidence of tissue ballots* at all, when the record shows that very many of the *original ballots* were put in evidence on the trial of the contest!

It is zealously urged by counsel for plaintiffs in error that the General Assembly did not have the power to declare the contestants elected Governor and Lieutenant-Governor, but that if it had been established that there was military intimidation, in the county of Jefferson, and that tissue ballots were used in the counties named in the notice of contest, this would have rendered the election void in the entire State. But that is not the law of Kentucky.

It is provided in subsection 8 of section 1531, Kentucky Statutes, (which treats of contested elections for Governor and Lieutenant-Governor, and the powers and duties of the Board of Contest), that in the event that it is found (1st) that the candidates receiving the highest number of votes given, have received an equal number of votes, the right to the office shall be determined by lot; (2d) where the person returned is found not to have been legally qualified to receive the office, at the time of his election, a new election shall be ordered; but (3d) "where another than the person returned shall be found to have received the *highest number of legal votes* given, such other shall be adjudged to be the person elected and entitled to the office."

Section 1462, Kentucky Statutes, requires that—

> "All ballots shall be printed on plain white paper, sufficiently thick that the printing can not be distinguished from the back."

This provision, enacted in pursuance of section 147, Constitution of Kentucky, has been held mandatory, and the use of

ballots which are not thick enough to preserve the secrecy of the vote avoids the election in the district or county where used. (Nall v. Tinsley, 21 Ky. Law Rep., 1167.)

The counties which used these illegal ballots were easily identified by the evidence, accompanied, as it was, in many instances by the original ballots. In such a state of case it was the duty of the Board, and of the General Assembly, to throw out the votes of the counties using the illegal ballots. The election was not thereby rendered invalid in the entire State. (Woolley v. Louisville South. R. R. Co., 93 Ky., 223.)

The same rule applies where military intimidation is shown.

It is respectfully submitted that the motion to dismiss the writ should be sustained, because no color of a Federal question is presented by the record; and that, in any event, the judgment of the Court of Appeals of Kentucky should be affirmed.

After all has been said, the attempt here is to induce this court to review the action of the General Assembly in passing upon this contest. It is respectfully submitted that the courts have no more authority to do this than the Congress of the United States would have to interfere in a case which this court had decided. Injustice may sometimes result from this limitation upon the power of the judiciary, but if our form of government is to be maintained, one department must not invade the jurisdiction of another. In closing, the attention of the court is called to the words of the Supreme Court of Indiana in Evans v. Brown, 30 Ind., 514:

> "Public authority and political power must, of necessity, be confided to officers, who, being human, may violate the trust reposed in them. This, perhaps, can not be avoided absolutely, but it applies also to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others; nor has it been able, at all times, with truth, to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise co-ordinate departments, and correct or prevent abuses of their author-

ity. It can not authenticate a statute; that power does not belong to it; nor can it keep the legislative journal. It is neither just nor modest for judges to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligation."

LEWIS McQUOWN,
Counsel for Defendants in Error.

LAWRENCE MAXWELL, Jr.,
W. S. PRYOR,
AARON KOHN,
ZACK PHELPS,
Of Counsel.